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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 173

MURRAY MESTER AND MEYER MESTER,
Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND BRIEF IN SUPPORT

PHILIP J. HENNESSEY, JR.,
BERNARD NOSKIN,
Counsel for Appellants.

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A. Petition for Rehearing.

Murray Mester and Meyer Mester respectfully petition this Court for rehearing of their appeal herein. By a per curiam order dated October 13, 1947, the judgment of a statutory court, convened under the Urgent Deficiencies Act in the Eastern District of New York, was affirmed on the basis of *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223.

Appellants respectfully submit that the WOKO case is neither applicable nor controlling with respect to the meaning of the word "character" as used in Section 308(b) of the Communications Act of 1934.

B. Brief in Support.

1. *There was no concealment.* Section 312(a) of the Communications Act of 1934 specifically, and in precise language, authorizes the Commission to deny a license "for false statements either in the application or in the statement of fact which may be required by Section 308 hereof. . . ." The Commission and this Court found in the WOKO case that there had been false statements wilfully and continuously made in applications filed with the Commission over a 12-year period on behalf of WOKO, Inc.

In this case, the Commission does not contend that any of the responses supplied by Murray Mester or Meyer Mester to the questions appearing upon the Commission's application form was false or misleading.

The decision in this case, therefore, cannot rest upon Section 312(a) of the Act as did the decision in the WOKO case.

Indeed, this record clearly establishes that all statements filed by appellants with the Commission were meticulously accurate and that the Commission had knowledge, both constructive and actual, well in advance of the hearing, of appellants' "numerous difficulties with various governmental bodies." (O'Dea Petitions to Intervene, R. 138, 154; Testimony of Leonard Marks, Commission counsel before the Select Committee to Investigate the Federal Communications Commission under H. R. 21, 78th Congress, 2nd Session (1944) p. 2929 et seq.).

2. *There was no disposition to conceal or deceive.* In the absence of any concealment or deception, the Commission justifies its denial of appellants' application upon what it calls their "lack of candor." Upon this finding of "lack of candor," it bases the conclusion that appellants are so

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singularly untrustworthy that they cannot be entrusted with control of a corporation licensed to broadcast. .

The Commission's Motion to Affirm in this Court at page 3 cites only one illustration of Murray Mester's purported "lack of candor." It warrants critical examination.

The Commission says "In the case of one of the judgments of condemnation involving a product called La Deliziosa Oil, Murray Mester gave testimony which conveyed the impression that he was not at all involved in that matter." The exact question and answer appear at page 342 of the record:

> "Question: (By Mr. Marks)—Is it your position that the notice referred to is not of the product which you manufactured?
> "Answer: (By Murray Mester)—Definitely."

Elsewhere in the record and exhibits introduced at the hearing, it is established that Murray Mester did not manufacture La Deliziosa Oil though he did ship some in interstate commerce. Admittedly, this question and answer are taken from a context which discloses a failure of the witness and counsel to understand each other's objectives.

Whether such testimony demonstrates a lack of candor or merely the confusion of a witness under harsh cross-examination cannot readily be determined from a stenographic transcript (though all the Commissioners except Mr. Durr who participated in this decision relied upon the transcript of testimony) but, in any event, there is a clear distinction between lack of candor and intention to deceive.

3. *Under the lower Court's definition of "character", there is no limitation upon the Commission's discretion.* If the assumption is once made that broadcast licenses may be denied to anyone whose character does not meet the approval of the Commission, then there are no discernable boundaries to the Commission's authority. The Court below made this assumption and said:

> "A person's 'character' is usually thought to embrace all his qualities and deficiencies regarding traits of

personality, behavior, integrity, temperament, consideration, sportsmanship, altruism, etc., which distinguish him as a human being from his fellow men."

We respectfully submit that neither the Communications Act nor the First Amendment countenances a limitation of licenses in this field to persons whose character, thus defined, is able to pass the scrutiny of a federal agency (*National Broadcasting Co. Inc.* v. *United States*, 319 U. S. 190, 227, dissenting opinion of Mr. Justice Murphy and Mr. Justice Roberts).

Respectfully submitted,

PHILIP J. HENNESSEY, JR.,
816 Connecticut Avenue
Washington 6, D. C.

BERNARD NOSKIN,
16 Court Street
Brooklyn, New York

Attorneys for Plaintiffs-Appellants

November 6, 1947

CERTIFICATE OF COUNSEL.

It is hereby certified that the foregoing Petition for Rehearing is presented in good faith and not for delay.

PHILIP J. HENNESSEY, JR.,
816 Connecticut Avenue
Washington 6, D. C.
Attorney for Plaintiffs-Appellants

PROOF OF SERVICE.

DISTRICT OF COLUMBIA: ss

I, Keo H. Goss, being duly sworn on oath depose and say that I have this 6th day of November, 1947, mailed copies of this Petition for Rehearing and Brief in Support to:

Philip B. Perlman, Esq.
Solicitor General of the United States
Department of Justice
Washington, D. C.

Max Goldman, Esq.
Federal Communications Commission
Washington, D. C.

Sanford Cohen, Esq.
565 Fifth Avenue
New York, New York
Attorney for Arde Bulova and Harry D. Henshel

Warren and McGroddy, Esq.
39 Broadway
New York, New York
Attorneys for Richard E. O'Dea

KEO H. GOSS.

Subscribed and sworn to before me this 6th day of November, 1947. My commission expires November 30, 1947.

EDITH Z. MILLER,
Notary Public.

(SEAL)